

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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UNITED STATES, et al., : Civil Action No.:
: 1:23-cv-108
Plaintiffs, :
versus : Wednesday, September 4, 2024
: Alexandria, Virginia
GOOGLE LLC, :
: Pages 1-37
Defendant. :
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The above-entitled motion to quash hearing was heard
before the Honorable Leonie M. Brinkema, United States
District Judge. This proceeding commenced at 10:04 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action Number
1:23-cv-108, United States of America, et al. versus Google
LLC.

Will counsel please note their appearance for the
record, first for the plaintiff.

MR. MENE: Good morning, Your Honor. Gerard Mene
with the U.S. Attorney's Office.

THE COURT: Good morning.

MS. WOOD: Good morning. Julia Tarver Wood from
the Department of Justice for the United States. With me
are my colleagues, Aaron Teitelbaum, Michael Wolin,
Michael Freeman, and Victor Liu. Thank you, Your Honor.

THE COURT: Good morning.

MR. HENRY: And good morning, Your Honor.
Ty Henry from the Virginia Attorney General's Office on
behalf of the plaintiff states.

THE COURT: Good morning.

MS. RHEE: Good morning, Your Honor. Jeannie Rhee
for Google, and I am -- with me here is Bill Isaacson,
Amy Mauser, of course you know Craig Reilly, and we're also
joined by Bradley Justus and Allison Vissichelli.

THE COURT: Good morning. And Mr. Henry, are you
going to be presenting any part of the case?

MR. HENRY: No, Your Honor.

1 THE COURT: No. You may find it more comfortable
2 to sit in the jury box. Is that your plan for the trial?

3 MR. HENRY: Yes, it is, Your Honor.

4 THE COURT: All right. And, again, you're sort of
5 coordinating -- why don't you come up to the lectern for a
6 second.

7 You're sort of coordinating the other state
8 attorney generals; is that correct?

9 MR. HENRY: That is correct.

10 THE COURT: And we talked last time, you estimated
11 approximately four to five would probably be attending the
12 trial; is that still your understanding?

13 MR. HENRY: That's still my understanding. I
14 think on the opening day of trial, we'll have four offices
15 represented and five attorneys present.

16 THE COURT: All right. That's fine. Again, as we
17 said, they will be sitting in the witness box -- in the jury
18 box, so they have comfortable seats and a good view of the
19 court proceedings. And then we're going to have, I suspect,
20 overflow for other Department of Justice attorneys in that
21 box as well.

22 I think -- I don't want to waste a lot of space,
23 but I'm not going to have any public sitting inside the
24 well. But that's how we're going to do things. All right.
25 Thank you.

1 MR. HENRY: Thank you, Your Honor.

2 THE COURT: All right. Before I get started on
3 any of these motions, have any of the issues been resolved
4 so we don't have to waste time discussing them? No.

5 MS. WOOD: No, Your Honor. There were some offers
6 in the papers about the motion to quash about a few
7 proposals, but other than that, no, Your Honor.

8 THE COURT: Right. All right. That's fine. All
9 right. Then let's get started.

10 Again, I've read the papers, and I've made my
11 decision. I don't think I'm going to hear -- need to hear
12 any argument.

13 So I first want to address the motion in limine or
14 motions in limine. And they're going to be sort of a mixed
15 result.

16 In terms of the government's motion in limine,
17 there are three issues that you've raised. The first one is
18 whether or not Google should be judicially estopped from
19 arguing basically the nature of the market that we're
20 dealing with here. I'm denying that motion because that's a
21 key issue in the case. I think Google has the right to make
22 its argument.

23 Now, I will say that the issue of judicial
24 estoppel is interesting, it got my attention. It may be a
25 problem for Google down the road, I'll have to see how the

1 evidence comes in, but I think they have a right to present
2 that argument. So that part of the motion is denied.

3 On the other hand, I am granting the second
4 request of the past decision by enforcers. The DoubleClick
5 and AdMeld acquisitions occurred more than ten years ago.
6 The world has changed dramatically in ten years. For
7 whatever reasons at that time, the reviewing agencies, the
8 FTC and the Department of Justice, did not oppose those
9 acquisitions, and any finding that they make at that time,
10 in my view, are actually irrelevant. The issue is whether
11 or not, during the time frame that's been alleged in the
12 complaint, the way in which the ad tech has been structured
13 has resulted in a monopoly, basically. And so I'm going to
14 grant that motion.

15 I will take judicial notice of the fact -- because
16 it's a fact -- that those two acquisitions were approved by
17 regulators at that time. That's an appropriate fact in this
18 record. But, beyond that, the rest of it, in my view, is
19 irrelevant, and so I'm granting that part of the motion.

20 The third issue that is raised by the government
21 is to keep out the various surveys produced by the
22 Advertiser Perception group. I'm going to allow those in
23 with some caveats that, as the trial gets going, if I find
24 that there really is a terrible foundation for them -- I
25 mean, I was intrigued by the fact that many of the Google

1 people thought they weren't very valuable, but I think to
2 the extent that they show an effort on Google's part, if I
3 find this is the case, to be mindful of what's going on in
4 the industry and the impact that these various technologies
5 have. Again, intent is part of the issue in this case. I
6 think they're sufficiently relevant; the question is how
7 reliable they will be, and that's a matter that we determine
8 at the trial itself. So the motion is denied in that
9 respect.

10 Google then has a motion in limine to exclude
11 various what you describe as non-party opinions. And I've
12 gone through the response of the government. I certainly
13 find that those witnesses can fully testify to all facts,
14 that is their experience in the industry, and they can,
15 based upon their experience, give their lay opinion as to
16 the impact of Google's ad technology on their ability to get
17 competitive pricing, et cetera.

18 The only thing they can't do -- and, again, it's a
19 bench trial, so I'm perfectly able to, you know, sensor
20 witnesses. If they try to say they're monopolists or they
21 try to, you know, draw the ultimate legal conclusion, I have
22 to do that. And so I'm going to deny Google's motion in
23 limine. And so I think that resolves those issues.

24 Ms. Wood.

25 MS. WOOD: Just one question, Your Honor.

1 It has been our experience then in certain
2 instances, the lay witnesses use the term "monopoly" in
3 their normal course documents for a business reason, not for
4 binding legal judgment.

5 THE COURT: And, again, if this were a jury trial,
6 we would have other issues we have to worry about. I can
7 bypass that. I make the decision ultimately. No matter
8 what your people say, I make the decision.

9 MS. WOOD: Understood. That's what I thought,
10 Your Honor, I just wanted to clarify.

11 THE COURT: All right. Ms. Rhee, was there
12 anything you wanted to -- I've ruled; so ...

13 MS. RHEE: No. Not on the motions in limine, Your
14 Honor. That was quite efficient, and we have nothing to
15 say.

16 THE COURT: Okay. All right. That's fine. That
17 takes care of that first set.

18 Now, the next thing is the joint motion for a
19 status conference. Obviously I'm granting that because
20 we're going to discuss those issues right now. And the
21 first one has to do about how we are going to handle the
22 submission of exhibits without a sponsoring witness.

23 I'm not going to impose upon myself, my law clerk,
24 or the Court of Appeals an unnecessary amount of
25 information. So you can't just dump a bunch of exhibits

1 into the record. The exhibits have to make sense. And the
2 way in which cases are traditionally tried is, as a witness
3 is testifying, if there are exhibits related to that
4 witness's testimony, you would admit them at that time. So
5 I would expect then, you know, during the course of
6 testimony, or after a witness has testified if there are
7 some exhibits that buttress or elucidate what the witness
8 said, that would be the appropriate time. But simply
9 putting them all in at the end of the government's case in
10 chief -- which is Google's suggestion -- doesn't make good
11 sense to me. All right. So there has to be some context in
12 which you're admitting these exhibits. All right.

13 Ms. Rhee, since that was sort of your -- you
14 wanted them -- or suggested that they be at the end of the
15 case in chief, you understand what I'm saying?

16 MS. RHEE: Yes. Actually, Your Honor, I think
17 that the Court's remarks right now are consistent with the
18 reason why we were a little bit concerned. Because,
19 frankly, it was a concern about a document dump at the
20 beginning of the government's case rather than, you know, to
21 have at least an opportunity to talk about which documents
22 actually made sense and were tied to and consistent with the
23 testimony and the evidence as it had come in.

24 What we didn't want was to waive the standing
25 objections that we have with respect to the otherwise

1 agreed-upon documents where certain foundational, right, and
2 custodial objections had been worked out by the parties, but
3 Google had reserved whether or not, for example, the
4 documents were double hearsay or whether or not the
5 documents were cumulative or whether or not the documents
6 had anything to do with the rest of the testimony that had
7 come in.

8 THE COURT: All right. Ms. Wood.

9 MS. WOOD: Yeah. What Your Honor has contemplated
10 is exactly the guidance we appreciated. We just wanted to
11 make sure that when we have a witness on the stand, the fact
12 that the witness may be examined on a topic that's relevant
13 to a document, but maybe the witness's name is not on that
14 document, how we proceed in that instance. And I think Your
15 Honor's given the clarity we needed, and we appreciate that.

16 THE COURT: All right. That's fine. Then the
17 second issue was depositions. All right.

18 Now, the way we're going to try this case is no
19 different from the way I would try any other case. And that
20 is, if a deposition is going to be used -- and my preference
21 is always for live testimony. And "live" means in the
22 courtroom live. That is the platinum standard for
23 testimony. But if we are using depositions, if there are
24 video versions of the deposition, I want to start with the
25 video so I can have seen the witness in person as best as I

1 can.

2 If the deposition is taking an unreasonably long
3 period of time -- many times I have found video depositions
4 are just painfully slow. Either the way the questions are
5 being formulated are just too slow or the witness is sitting
6 there looking at the sky having to think, it's just too
7 slow. In which case we would then shift to having whichever
8 law clerk I have available in the box, and your reading --
9 you know, the appropriate lawyer, whether it was, you know,
10 plaintiff or defendant, reading the questions, and that's
11 it.

12 But that is the extent of the deposition evidence
13 that's going to go into the record. I'm not going to accept
14 the entire deposition transcript at the end of the trial.
15 So whatever portions of the depositions you're using, you
16 use them during the four corners of the trial.

17 And just so everyone is clear, the standard
18 practice among the court reporters I work with is, they do
19 not take down the deposition testimony if it's fully
20 recorded. If it's being read into the record, because
21 that's happening sort of live in the courtroom, there will
22 be a transcript of that. But if you're just playing the
23 audio version of the deposition, that audio is not being
24 taken down by the court reporter. So everyone is clear
25 about that.

1 Now, that creates sort of an interesting problem,
2 or just thought, and I just want you to be thinking about
3 this. The rule that we have in terms of evidence is that
4 the parties are required to make the evidence that's been
5 entered into evidence available to the public by 10:00 the
6 next morning. I'm making an exception to that for video
7 depositions. Only the audio portion or the printed portion
8 of that is what I want you to post. I think it would be
9 inappropriate to have the visual -- the pictures of the
10 person who's testifying. Am I clear about that? I just
11 thought about that this morning, but it is a problem,
12 because we don't allow video broadcasts of the trial. So
13 that would allow certain trial witnesses to be out there,
14 and that's not appropriate.

15 MS. WOOD: Yes, Your Honor. That's exactly the
16 clarity we were thinking of.

17 So just the transcript -- the excerpts of the
18 transcripts that were played in court would be made
19 available on the website. Yes, Your Honor.

20 THE COURT: Right. Because that is the evidence
21 that's coming in.

22 MS. WOOD: Yes.

23 THE COURT: All right. Does Google have any
24 objection to that?

25 MS. RHEE: No, Your Honor.

1 THE COURT: Okay. Now, I think you're both on the
2 same time frame in terms of how you're going to exchange
3 designations. I was actually a little bit worried because I
4 guess the technology that you both have available to you can
5 make these corrections this quickly, but you both are
6 agreeing to four days, at least, advance notice as to what
7 your proposed designations are.

8 MS. WOOD: So as part of the pretrial process,
9 Your Honor, both sides have already submitted designations,
10 counter-designations, fairness designations. And so what
11 remains ahead of us is trying to distill that even further
12 by a meet-and-confer process to make it as tight as possible
13 for the presentation to the Court. And so I think we are
14 absolutely prepared to take on that obligation to whittle
15 them down so we are as efficient as possible.

16 THE COURT: You've worked very well together, so
17 I'm not expecting a problem there. But if I read this
18 correctly, I think you both have the exact same time frame
19 for this.

20 MS. WOOD: Yes, Your Honor.

21 MS. RHEE: We do.

22 MS. WOOD: We met and conferred, yes.

23 THE COURT: Great.

24 MS. RHEE: There's been a lot of meeting and
25 conferring, as I think the Court is well aware.

1 THE COURT: And we see the results of that, so I
2 appreciate that very much.

3 All right. And then in terms of post-trial
4 submissions, again, I'm going to sort of leave that open.
5 It depends on how the trial goes. I mean, we've got the
6 advantage of the pretrial filings, and we're able to also
7 determine whether there have been a significant shift in the
8 case as the case develops.

9 I have an open mind about whether I'll request
10 post-trial revisions of the proposed findings. All right.
11 So I'm going to leave that issue open. I don't think anyone
12 needs that answer right away; do you? No, because you won't
13 know what they are until we've got the trial going. All
14 right.

15 I think that took care of everything. Was there
16 anything else in your joint motion for status conference? I
17 think I addressed everything.

18 MS. WOOD: That's it for the joint motion.

19 I think the parties are still working on a
20 glossary, and we will meet and confer on a glossary that
21 could hopefully assist the Court as the trial develops, and
22 we may want to mark that as, you know, an exhibit that can
23 also be publicly put on the website.

24 THE COURT: That would be a good idea, yeah.

25 MS. RHEE: Yeah. And I think, as the Court is

1 well aware and Ms. Wood alluded to, the parties are still
2 actually talking through the proposal that DOJ put forward
3 with respect to two of the Xogglers, or the ex-Google
4 employees, with respect to possibly reaching an agreement on
5 a stipulation about documents.

6 MS. WOOD: With respect to the motion to quash,
7 Your Honor, I think that's what Ms. Rhee is referring to.

8 THE COURT: Right. All right.

9 MS. RHEE: As a housekeeping matter, Your Honor,
10 there's also pending before this Court a request on the
11 Google side for certain electronics, and so that's --

12 THE COURT: I was going to address that.

13 MS. RHEE: Okay. Thank you.

14 THE COURT: I have a bunch of sort of housekeeping
15 matters before we get to the motions to quash.

16 All right. First of all, I'm trying to maintain
17 as even a playing field for the lawyers and parties as I
18 can. Now, the government has an advantage because they are
19 able to get into the courthouse through the U.S. Attorney's
20 Office. Google doesn't have that advantage. And I will
21 share with you, I am concerned, at least on the early days
22 of trial, about a lot -- a problem -- a traffic control
23 problem at the front door to the courthouse.

24 The courthouse opens at 8:00 in the morning. We
25 start trial at 9:00. I've got to be able to be sure that

1 the lawyers are here in the courtroom early enough to set
2 themselves up, et cetera. What we have done -- and we're
3 not doing it for the government because they don't need it.
4 But for Google, we have ID cards that we've made up. All
5 right. We have instructed the court security officers at
6 the front that anybody who has one of these badges should
7 get wanded ahead of anybody who's in line.

8 So for Google people -- and I think we have enough
9 for all of you. Mr. Reilly, I contacted him Friday, to get
10 the names of everybody who could possibly be working on
11 behalf of Google during the course of the trial. So you'll
12 each have one of these badges. That badge will get you
13 through -- it should get you through faster.

14 On Thursday -- where is it -- Thursday,
15 September 19th, is naturalization day here at the
16 courthouse. The crush of people, both in the morning and
17 the afternoon, is very high, and we've had problems in
18 trials before of not getting everybody in on time because of
19 that. So, again, you'll have to do a little bit of, you
20 know, New York subway-style pushing, perhaps, to get past
21 folks in line. But the CSOs know at the front desk, you
22 show them the badge, they'll do a faster wand and get you up
23 here sooner. So there shouldn't be any problem with Google
24 having easy access to the courtroom. All right.

25 I'm also going to have a similar type of badge

1 made up for witnesses. One of my other concerns is, you
2 know, we have a witness, we break for the lunch hour break,
3 at 2:00, the witness can't get in because -- or can't get in
4 on time. And, you know, that one-hour break is not all that
5 long if they go out to get lunch, and they have to be back
6 here at 2. I don't want to have to wait until 2:20 to be
7 able to start the afternoon session.

8 So when you have a witness who's going to have a
9 lunch break before they leave, we're going to give them a
10 card, and that card should also get them a quick
11 pass-through. But they'll have to know to get past the
12 line, if there is a line, just excuse me, excuse me, use the
13 elbows and get through, and then the CSOs will wand them up
14 and they can get up here. So hopefully that will avoid that
15 logistical problem.

16 MS. WOOD: We appreciate that, Your Honor. I
17 think that's a great suggestion.

18 THE COURT: All right.

19 MS. RHEE: Yes. We're quite thankful.

20 THE COURT: All right. So don't leave before you
21 Google people get those things. All right.

22 MS. RHEE: Oh, we certainly will not.

23 THE COURT: Okay. Let's see. We've had at least
24 two requests so far for -- because of medical issues to
25 bring some electronic devices in. We've taken care of the

1 two requests that we've had. If there are any others, we
2 need an advance on that, otherwise there's a problem with
3 the CSOs down front. So you need to make sure witnesses let
4 you know if they have an issue, all right, and then you have
5 to let us know.

6 I think you've met my new law clerk, Chris Gorman.
7 He replaced Mark. He's the new clerk on this case, primary
8 clerk. You've met the two new court security officers,
9 correct, who will be working? Now, one officer is going to
10 be over in 701 for the overflow courtroom, and then while my
11 current CSO is on vacation for the first two weeks, we'll
12 have a substitute, and then you'll see a shift. But you
13 need to get to know the CSOs because they're here to help
14 you get comfortable in the courtroom.

15 I'm going to repeat what I said last week, and it
16 is going to go out in an order hopefully today because we've
17 had a lot of requests from the media folks. I'm going to
18 reserve -- and I've changed my mind now. I'm going to
19 reserve the first three rows on the right side of the
20 courtroom, my right, your left, for media people. If there
21 are more people than can fit there, they sit just like
22 anybody else, wherever they can find a seat. But the first
23 15 or so media folk who get in here will be able to sit
24 there. There will be some kind of media badge that can be
25 picked up at the clerk's office. That will be announced on

1 our website hopefully sometime today. And so that's how
2 we're going to handle the media folks.

3 We've taken care of the government people, and the
4 first row will be reserved for Google. If you're not using
5 the entire first row, we may only give you one half. Again,
6 I want to accommodate as many people as we can in this
7 courtroom. All right.

8 Let me see if there's anything else.

9 All right. For next week, I can give you a solid
10 schedule, all right, because we've cleared some things on
11 the docket. So, for next week, we are going to be able to
12 start at 9:00 Monday, Tuesday, Wednesday, and Thursday. And
13 we will be able to start by 9:30 on Friday. So you can go
14 to the bank on that starting schedule for next week.

15 It looks as though, at least Monday through
16 Wednesday of the following week, we can also start on time.
17 But I'm going to wait and just see whether we pick up some
18 stuff that has to be done. So that's good because that
19 means you're not going to have to unset your tables and
20 stuff.

21 I think I told you we do have the two witness
22 rooms across the hall. If you want to check that space out,
23 I think maybe on Friday when your exhibits are presented to
24 the Court, it would be a good chance to see that, because
25 you'll probably want to set things up. Those rooms will be

1 locked, and we'll unlock them in the morning so that your
2 folks have access to them.

3 I gave you an order a few days ago about how
4 you're going to handle the exhibits. I hope that was clear.
5 Again, I don't see any reason for overloading the clerk's
6 office with thousands of pieces of paper. So the main thing
7 we have to watch, though, is the electronic version of the
8 exhibits will, itself, have to be edited down the road if
9 some of the exhibits that are on that master disk do not
10 ultimately get entered into evidence. All right.

11 Now, I am curious, is there any reason that the
12 exhibits that are not entered into evidence have to be kept?
13 I mean, I think I sort of questioned that in that order that
14 I gave you all. The normal practice here is the only
15 exhibits that the clerk's office holds onto are the ones
16 that have actually been admitted into evidence.

17 MS. WOOD: We agree with that approach, Your
18 Honor. The only thing we might want to keep for purposes of
19 the record might be certain demonstrative exhibits. But
20 regular exhibits that are not actually moved into evidence
21 during the trial, I see no --

22 THE COURT: Or if I don't permit them in.

23 MS. WOOD: Exactly.

24 THE COURT: Or you've move them in and I've
25 sustained the objection.

1 MS. WOOD: Excluded them, yes.

2 THE COURT: Yes, I've excluded them.

3 MS. RHEE: We're in complete agreement with the
4 Court.

5 THE COURT: That's fine. Again, there will be
6 some editing of that down the road. All right.

7 Now, I love the idea of witness books. That makes
8 things much easier. But my question is this: Let's say
9 you -- during the testimony of Witness Number 1 you use
10 Exhibit 13. So 13 comes into evidence through Witness
11 Number 1. Down the road, Witness 17, you also want to show
12 that exhibit to that person. Are you putting that exhibit
13 in that witness's book?

14 MS. WOOD: Yes, Your Honor.

15 MS. RHEE: Yes, Your Honor.

16 THE COURT: Fantastic. That's fantastic. Okay.

17 And then my plan is at the end of each trial
18 day -- so we actually may stop testimony at ten of 6 --
19 we're going to read into the record those exhibits which my
20 courtroom deputies believe have been entered into evidence,
21 and that will be your opportunity to, number one, say, no,
22 that exhibit was not entered; or, two, you forgot exhibit
23 such-and-such. So at the end of each day, we should have
24 definitively on the record what's been entered into
25 evidence, and then your tech people will do the necessary

1 whatever they have to do to get them on the website.

2 Is there any problem with doing it that way? That
3 means at the end of the trial, we don't have to sit for a
4 day and go through the exhibits.

5 MS. WOOD: I think it's wonderfully efficient,
6 Your Honor. Thank you.

7 THE COURT: All right. Ms. Rhee, does that create
8 a problem for Google?

9 MS. RHEE: We don't object to the process.

10 THE COURT: At the lectern.

11 MS. RHEE: We don't object to the process, Your
12 Honor.

13 THE COURT: Okay.

14 MS. RHEE: I think we just want to get a
15 clarification that, consistent with what the Court said
16 earlier this morning, for exhibits that either party seeks
17 to admit after the witness in order to do cleanup with
18 respect to the admission of exhibits, all of that will also
19 then be taken into account at the end-of-the-day
20 reconciliation?

21 THE COURT: I'm sorry. Let me hear the last part
22 of that.

23 MS. RHEE: So there are --

24 THE COURT: I'm sorry. So you're saying Witness
25 Number 1 testifies, 17 exhibits are entered formally as that

1 witness testifies.

2 MS. RHEE: Correct.

3 THE COURT: At the end of the full testimony,
4 there are four other exhibits that are relevant to that
5 testimony without there being somebody to propose them. All
6 right.

7 So the attorney is going to say: Judge, we would
8 like to add at this time exhibits such-and-such and
9 such-and-such and such-and-such because they do whatever.
10 And, at that point, that's fine. That's fine. That would
11 still be read into the record at that point.

12 The only trick will be if you're then going to use
13 one of those exhibits down the road to question a witness
14 the next day -- I'm trying to avoid having 20 books up here
15 and having to run back and forth. Okay. So to the extent
16 you can avoid that, that's --

17 MS. RHEE: Yeah. I think the parties are
18 committed to facilitating the convenience of the Court to
19 make sure that for every subsequent witness, even if there
20 are duplicates of documents, they will be contained within
21 that witness's exhibit book.

22 We just wanted to be assured that at the end of
23 the day, a counting and reconciliation of what exhibits, in
24 fact, have been entered into evidence, that it will take
25 into account these interregnum periods --

1 THE COURT: Absolutely.

2 MS. RHEE: -- between the parties so that we can
3 make sure that it's pretty clear about which exhibits have
4 been introduced.

5 THE COURT: Absolutely. That's not going to be a
6 problem.

7 MS. RHEE: Okay. Great.

8 THE COURT: And I'm assuming that multi-page
9 exhibits all have good clear Bates stamp numbers on them?

10 MS. RHEE: Yes, Your Honor.

11 THE COURT: Excellent. Okay. Let me see if
12 there's anything else.

13 Also --

14 MS. RHEE: Oh, Your Honor.

15 THE COURT: Yes.

16 MS. RHEE: I should just put as an asterisk to
17 that, there are a small set of exhibits that are in native
18 format, in which case they do not have individual Bates
19 numbers. It's just one Bates number for the native document
20 or the native exhibit.

21 THE COURT: All right. That always becomes pretty
22 problematic if you have to refer to a particular page.

23 MS. RHEE: And we understand that, and I think
24 just speaking for Google, we will endeavor to be very clear
25 and also to direct both the witness, the Court and the clerk

1 about, for those exhibits, where we're directing the
2 questioning.

3 THE COURT: That's fine. Great.

4 The only other thing I wanted to mention to you,
5 for planning purposes is, on Tuesday, September 24 -- I want
6 to make sure I've got the right date -- I think that's the
7 day we have to stop a little bit early. Yeah. That day
8 we're going to stop the trial at 4:30 in the afternoon.
9 There's an event that I have to attend. I think,
10 Mr. Reilly, you'll be at that as well.

11 All right. Those were my housekeeping issues.
12 Are there any other purely housekeeping matters that we need
13 to discuss?

14 MS. WOOD: No, Your Honor. Thank you.

15 THE COURT: All right. There is something from
16 Google.

17 Mr. Reilly had submitted a request for
18 authorization for electronic devices that I entered on
19 August 28. And then we got what I guess is a supplemental
20 one that was filed, I believe, yesterday. I have previously
21 allowed the government two laptops. I'm sticking,
22 Mr. Reilly, with the original one that I did, which is two
23 laptops. As long as whoever brings them into the courthouse
24 has a copy of the order that I've entered, or, you know, the
25 form, we don't need the names of the people. All right.

1 MR. REILLY: If I could explain.

2 The first request including the two laptops, Your
3 Honor, was for the hookup to the electronic presentation
4 system, a primary one and a backup. I've had them fail.
5 That was the purpose of bringing them in.

6 THE COURT: Right.

7 MR. REILLY: Our second request which we've
8 submitted was for attorneys or a paralegal to be able to
9 keep track of admitted exhibits and for quick access to the
10 exhibits. We will be seeing the witness notebooks each side
11 in real time, and we would need to quickly access the
12 objections so that there isn't a delay. When Ms. Wood says
13 please take a look at Exhibit Number 13, we would be able to
14 quickly find whether we had objected to that or not and then
15 make the objection quickly. So the purpose of the
16 additional laptops we've requested was for lawyers or
17 paralegals in the gallery to keep track of admitted
18 exhibits.

19 THE COURT: That's too much electronics.

20 MR. REILLY: Okay.

21 THE COURT: This is an old-fashioned courtroom.
22 Each side's got two. All right.

23 MR. REILLY: All right. So we'll have the two,
24 and the second one we can use for those other purposes.

25 THE COURT: Correct.

1 MR. REILLY: Thank you, Your Honor.

2 THE COURT: In the well.

3 MR. REILLY: In the well.

4 THE COURT: Yes.

5 MR. REILLY: Thank you.

6 THE COURT: Because the government is comfortable
7 with two; Google will have to work with two.

8 All right. So that I'm denying the one that was
9 filed yesterday.

10 All right. That's it for me with housekeeping
11 matters.

12 Was there anything further, first for the
13 government?

14 MS. WOOD: No, Your Honor.

15 THE COURT: All right. Ms. Rhee, is there
16 anything further from Google?

17 MS. RHEE: No, Your Honor.

18 THE COURT: All right. And as I said, sometime on
19 Friday, you'll make arrangements to bring everything into
20 the courthouse so we're set up to go on Monday. And, in
21 fact, I don't mind if you start bringing it into the
22 courtroom. I think that would be better so that we have
23 everything ready to start. Okay.

24 Then I believe the last issue we have to address
25 are these motions to quash. And I'm going to move quickly

1 on those as well. I don't think I need to hear any
2 argument.

3 While I recognize that the standard rule for most
4 civil cases is that outside of the 100-mile reach of the
5 Court, subpoenas cannot, you know, be enforced unless the
6 parties agree to appear. This is a Clayton Act case, and
7 there is an exception.

8 I do not agree with the position that
9 Judge Anderson did not approve this. I recognize there may
10 not have been the degree of clarity that perhaps Judge Mehta
11 had in his standing order, but I've talked with
12 Judge Anderson, and I, myself, have reviewed your arguments
13 and papers.

14 I think frankly one could reasonably read into the
15 discovery order that was issued that he had approved this.
16 In any case, I think in this case -- because as I've said
17 before, live testimony is always preferable, and this is a
18 serious case, and we need to have the best possible way of
19 presenting the evidence. So I'm overruling the motions to
20 quash to that degree.

21 Now, what I am more concerned about, though, is
22 trying to accommodate the witnesses, because we have at
23 least two coming from California, and so I want to make sure
24 that there has been a reasonable accommodation of their
25 concerns. And for the one witness, Mr. LaSala, he is a

1 professor at Columbia Business School, and obviously his
2 appearance needs to be worked out so that he does not create
3 prejudice for his students who will miss class. But in
4 terms of the argument that he needs to prepare, he can
5 comfortably prepare, you know, if he's sitting over at the
6 Westin or whatever.

7 But I also don't feel it's appropriate to have
8 these witnesses have to sit around and wait. And so the --
9 you know, the alternative in several of these motions was
10 for a protective order, to some degree. That is requiring
11 the government to make a more certain time frame for when
12 these witnesses would be needed. And so each one of the
13 witnesses, I believe, has given a time frame during which
14 they are -- you know, if they must testify, when they would
15 be available. And so I was surprised, Ms. Wood, that you've
16 not been able to work out more specifically when these
17 witnesses would be called.

18 MS. WOOD: Your Honor, we're happy to work out
19 timing. I think we had done that with respect to many
20 witnesses that are appearing. We're more than happy to work
21 about -- you know, obviously we're not in complete control
22 of when the prior witness gets off the stand, that depends
23 in part on the length of the cross-examination by Google's
24 counsel. But we're more than willing to work with these
25 witnesses and have -- with these and others, assured them

1 that we will work with the time constraints and give them as
2 much notice as possible.

3 THE COURT: And sometimes what has to happen --
4 especially people coming from California, I mean, they're
5 going to lose almost a day in just transit and then
6 whatever -- we can always break into testimony, too.

7 MS. WOOD: Excellent.

8 THE COURT: So, I mean, if you've got Mr. Bender
9 coming in on -- let's say he's coming in for testimony on
10 the 13th of September, if the witness who's testifying on
11 the 12th hasn't finished, we just delay finishing and we
12 have Mr. Bender start at 9:00 on the 13th.

13 MS. WOOD: Absolutely, Your Honor. We have no
14 problem with that.

15 THE COURT: All right. So I expect you all to --
16 you've worked so well together -- to be able to work that
17 out. When I say "you," I know we have different counsel
18 here for these different witnesses. But I really don't have
19 to hear argument on that. I expect you all to be able to
20 work this out in a reasonable fashion.

21 Now, the government has indicated that as to
22 Mr. Lipkovitz and Mr. Cox, you're pulling back from
23 requiring or wanting them to be here in person?

24 MS. WOOD: I think the two issues with
25 Mr. Lipkovitz and Mr. Cox are, one, with respect to

1 Mr. Lipkovitz, it depends in part on discussions about the
2 videos, and now we have clarity on that. I think with that
3 understanding that we'll be able to work with Google to
4 present Mr. Lipkovitz's testimony by video, we'll do that.
5 His investigation deposition is -- was not videotaped, so
6 that would be one -- portions of which we would read in the
7 old-fashioned way with the clerk on the stand.

8 With respect to Mr. Cox, I think the issue is that
9 he has given testimony recently in June in the MDL, and
10 pursuant to the coordination order with the MDL, that is not
11 to be used affirmatively. So if we call him live, we could
12 explore subjects. And to the extent we could agree with
13 opposing counsel and the Court were willing to allow for
14 that one witness alone to be able to use the MDL testimony
15 at this trial, I think that would obviate the need for
16 calling him live. And, again, just very targeted portions
17 of that MDL deposition, just like the others.

18 THE COURT: I don't know who's representing
19 Mr. Cox. Why don't you all come up.

20 MS. CLARK: Juliet Clark and Amy Manning from
21 McGuireWoods. Ms. Manning will cover argument.

22 THE COURT: Good morning.

23 MS. MANNING: Good morning, Your Honor.

24 THE COURT: Have you talked with the government
25 about that possibility of the MDL testimony being used?

1 MS. MANNING: No. They have not contacted me at
2 all about Mr. Cox. This is the very first conversation.

3 THE COURT: Offhand, do you have a position on
4 that?

5 MS. MANNING: I think that might be between Google
6 and the government, what they want to do on his MDL
7 testimony. So I don't think I have a position on it.

8 THE COURT: You don't object?

9 MS. MANNING: I don't.

10 THE COURT: All right. Well, then -- thank you.

11 I think then you all need to see if you can work
12 that out; all right?

13 MS. WOOD: Yes, Your Honor.

14 MS. RHEE: Yes. So the --

15 THE COURT: I'm sorry?

16 MS. RHEE: The parties here, Your Honor, Google
17 and the government, have been talking about what Ms. Wood is
18 proposing. I think we just -- speaking for Google here, we
19 are talking to the government about exactly what they have
20 in mind, and we are very hopeful that we can reach a
21 resolution and come to the Court.

22 THE COURT: Would we need to have an order in the
23 Texas case getting leave to use that testimony? There's no
24 court order that would restrict this?

25 MS. RHEE: It's not the Texas case, Your Honor;

1 it's the MDL.

2 THE COURT: Oh, okay.

3 MS. RHEE: So again --

4 THE COURT: I mean, I could call Judge Castel if
5 you wanted me to. Is that necessary?

6 MS. RHEE: We don't think that that's going to be
7 an issue; it's really just about what the clips are, what
8 the excerpts are. And we just ran out of time, frankly, to
9 be able to do that back-and-forth exchange.

10 THE COURT: All right. But it does sound then as
11 though those two witnesses will not need to be here.

12 MS. WOOD: Yes, Your Honor. With those
13 understandings, absolutely.

14 THE COURT: All right. As to the other four,
15 that's Mr. Bender, Mr. Spencer, Mr. Srinivassan and
16 Mr. LaSala, those witnesses would be coming live?

17 MS. WOOD: Yes, Your Honor.

18 THE COURT: But the government does need to work
19 out a reasonable time frame.

20 MS. WOOD: Absolutely, Your Honor.

21 THE COURT: All right. The attorneys representing
22 those witnesses, I mean, you've entered your appearances on
23 paper. I don't need to really hear any argument, but I'm
24 going to assume, since I think all of you, possibly with the
25 exception of Mr. LaSala, did have the caveat or the request,

1 you know, in lieu of quashing the subpoena, could we work
2 out an arrangement.

3 Do you have any objection if we can work out the
4 time frame that your clients have talked about? No. Okay.

5 So the burden is on you all to work it out. But,
6 as I said, I think the smart thing would be to have a time
7 certain for these witnesses. All right. So if it's 9:00,
8 no matter where we were the day before, at 9:00 we start
9 fresh with that witness. I can keep track of, you know,
10 prior witnesses' testimony. All right.

11 All right. I think that takes care of everything
12 I had.

13 Is there anything further that you want to raise?

14 MS. WOOD: Nothing, Your Honor.

15 THE COURT: Ms. Rhee, what about from Google?

16 MS. RHEE: No, Your Honor. And we do appreciate
17 the Court's observation about the accommodation.

18 THE COURT: All right. And, again, we have the --
19 don't leave without your badges. All right.

20 MS. RHEE: I can assure you, we're absolutely not
21 leaving without those badges.

22 THE COURT: Have your tech people all worked with
23 Mr. Bachman in terms of the technology?

24 MS. WOOD: Yes, Your Honor.

25 MS. RHEE: For Google, it's scheduled for

1 tomorrow.

2 THE COURT: For tomorrow. All right. That's
3 fine. All right. Some of your folks will be here with
4 that. And, as I said, the space will be available to you.

5 You should probably check with my court security
6 officer, Mr. Hendrick, about when you're going to come in on
7 Friday. I have a docket in the morning. I have a docket in
8 the morning at 10, and I have a plea at 2. So you'll have
9 to work around that schedule. But we want to get everything
10 in the courthouse, in the clerk's office, in those rooms so
11 we're all set to go; all right?

12 MS. RHEE: Absolutely, Your Honor.

13 THE COURT: All right. And even though
14 technically the government could get access to space in this
15 building sooner, you have to play by the same rules as
16 Google.

17 MS. WOOD: We're more than happy to play by the
18 same rules.

19 THE COURT: You can't come in on Saturday and play
20 around with the stuff; all right?

21 MS. WOOD: Of course not.

22 THE COURT: Okay. Very good. Well, we'll see you
23 all on Monday.

24 Again, I'll just remind you all, there's still
25 time to settle.

1 MS. WOOD: Thank you, Your Honor.

2 THE COURT: All right.

3 MS. WOOD: Much appreciated.

4 THE COURT: We'll recess court.

5 (Proceedings adjourned at 10:45 a.m.)

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7 I certify that the foregoing is a true and accurate
8 transcription of my stenographic notes.

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Stephanie Austin

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Stephanie M. Austin, RPR, CRR

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